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Nos. 78-432, 78-435 and 78-436

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Petitioner
vs.
BRIAN F. WEBER, ET AL.

KAISER ALUMINUM & CHEMICAL CORPORATION
Petitioner
vs.
BRIAN F. WEBER, ET AL.

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Petitioners
vs.
BRIAN F. WEBER, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF THE CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION

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I

INTEREST OF THE AMICUS CURIAE

California Correctional Officers Association (hereinafter "CCOA") has been granted permission to file an Amicus Curiae brief by counsel for all of the parties herein. The original letters expressing consent, or lack of objection to the filing of this Amicus Curiae Brief, have been transmitted with the brief for filing with the Court. CCOA is an organization of some Four Thousand (4000) correctional officers employed by the State of California.

CCOA, on behalf of itself and its members, filed an action entitled *Minnick, et al. v. California Department of Corrections* (Case No. 700-048) in the Superior Court of the State of California in and for the City and County of San Francisco alleging that the California Department of Corrections and the State of California have been illegally granting preferences in hiring and promotion on the basis of race. CCOA prevailed in that action, and is currently defending an appeal by the defendants in the Court of Appeal in the State of California, First Appellate District (Case No. 42545). An issue raised therein, as it is in the instant action, is the propriety of instituting a voluntary affirmative action program which grants preferences on the basis of race. CCOA has filed an Amicus Curiae brief in this action as it is inevitable that any decision herein will affect its interest in the action pending in the California Courts.

II

ARGUMENT

The Amicus Curiae supports the respondent, Weber, in the instant action, but does not wish to engage in lengthy argument on the issues already raised herein. The Amicus Curiae merely wishes to present an argument which has not yet, to our knowledge, been presented to this Court. The Amicus Curiae contends that in the provisions of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq., Congress explicitly contemplated those situations in which it would be legally permissible to grant preferences.

Congress provided in § 703(i), 42 U.S.C. § 2000 e-2 (i), as follows:

> "Nothing contained in this Title [42 U.S.C. § 2000(e) et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a *preferential treatment is given to any individual because he is an Indian living on or near a reservation.*" [Emphasis added].

This much ignored section immediately proceeds § 703(j) which provides that preferential treatment should not be required on account of numerical or percentage imbalances. 42 U.S.C. § 2000 e-2 (j). Not only did Congress expressly limit the preferential treatment allowed to that given by employers "on or near an Indian reservation," but limited that preference only to Indians *"living on or near a reservation."* When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929). The Court of Appeals in the Seventh Circuit has stated that the Courts are barred from additions

to a prescribed list by the maxim *expressio unio est exclusio alterius*, and the Court does not have the authority to extend the statutory catalog of invalidating conditions. *Hawkeye Chemical Co. v. St. Paul Fire & Marine Insurance Company*, 510 F.2d 322, 327, (7th Cir. 1975) cert. denied 421 U.S. 965 (1975). Thus, under Title VII, not only is preferential treatment limited to Indians, but Congress limited preference to Indians living on or near a reservation. Where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. *J. Ray McDermott & Company, Inc. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972) cert. denied, *Fish Meal Company v. J. Ray McDermott & Co., Inc.* 409 U.S. 948 (1972); *City of Burbank v. General Electric Company*, 329 F.2d 825, 832 (1964); *Federal Trade Commission v. Sun Oil Company*, 371 U.S. 505, 514-515 (1963).

Although there is probably no group in the history of the United States that has been more maligned, abused and discriminated against than Indians, this Court has not found that prior discrimination justifies preferential treatment in employment for Indians. In *Morton v. Mancari*, 417 U.S. 535 (1974), it was the unanimous view of the Court, as expressed by Justice Blackmun, that § 12 of the Indian Reorganization Act of 1934, 25 U.S.C.S. § 472, which grants to Indians an employment preference in the Bureau of Indian Affairs, was not in violation of the Equal Employment Opportunity Act of 1972 (5 U.S.C. §§ 5108, 5314, 5315, 5316; 42 U.S.C.S. §§ 2000e, 2000e-1, 2000e-6, 2000e-8, 2000e-9, 2000e-13, 2000e-17), nor was it in violation of the due process clause of the Fifth Amendment. The Court held

that the preference did not constitute racial discrimination, nor indeed even a racial preference, but was rather a criterion "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Morton v. Mancari*, 417 U.S. 535, 554. Justice Blackmun indicated that it would be improper to grant a preference based upon race rather than one based upon recognition of the special legal position of Indians:

> "The exemptions reveal a clear Congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment *did not constitute racial discrimination of the type otherwise proscribed*." Id. 417 U.S. 535, 548.

In a more recent decision, Chief Justice Burger expressing the unanimous view of the Court, wrote the following, referring frequently to the *Morton* decision:

> "The decisions of this Court leave no doubt that Federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon *impermissible racial classifications*." [Emphasis added] *United States v. Antelope*, 430 U.S. 641, 645 (1977).

Never has it been shown that Congress intended in passing Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq., to permit employers to conclude that they had discriminated and to consequently grant preferences in employment to some races to the disadvantage of others. Congress specifically authorized the granting of preferences to Indians living on or near reservations, but otherwise authorized only the Courts to grant preferences and only then *after* a finding by the Courts that the employer had engaged in an unlawful employment practice:

> "If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice or other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay • • • or any other equitable relief as the Court deems appropriate . . ." § 706(g) of Title VII, Pub. L. 88-352, 78 Stat. 261, as amended, 42 U.S.C. 2000 e-5(g).

Certainly, there is nothing in Title VII which prohibits employers from affirmatively taking steps to eradicate discriminatory selection devices. However, Congress narrowly limited the circumstances in which the rights and expectations of innocent third parties could be impaired by the granting of preferences. One might think that Justice Blackmun had the instant case in mind when he cited to the House report in his opinion in *Morton v. Mancari:*

> " 'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should be not treated similarly . . .' HR rep. No. 92-238, on HR 1746, pgs. 24-25 (1971)." 417 U.S. 435, 547.

III

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted

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